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Supreme Court, U.S.
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No.

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1999

STAFF SERGEANT KEVIN TOWNES, USMC, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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36PP

QUESTION PRESENTED

Did the USCAAF err in holding that a court-martial composed of enlisted members had jurisdiction to try Petitioner where there was no personal request for trial by enlisted members as required under Article 25, UCMJ?

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KEVIN TOWNES, *Petitioner,*

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UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

Staff Sergeant Kevin Townes, U.S. Marine Corps, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces [USCAAF], reported at 52 M.J. 275 (2000), is located at Appendix A (1a-6a). The opinion of the Navy-Marine Corps Court of Criminal Appeals [NMCCA], reported at 50 M.J. 762 (N.M. Ct. Crim. App. 1999), is located at Appendix B (7a-18a).

JURISDICTION

The USCAAF entered its judgment on March 8, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in part:

> No person shall be . . . deprived of life, liberty or property, without due process of law . . . .

Article 25(c)(1), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 825(c)(1) (1994), provides in pertinent part:

> Any enlisted member of an armed force on active duty . . . is eligible to serve on general and special courts-martial for the trial of any enlisted member . . . but he shall serve as a member of a court only if . . . the accused personally has requested orally on the record or in writing that enlisted members serve on it.

STATEMENT

At an initial pre-trial session on February 10, 1993, the military judge advised Petitioner generally of his options to trial by a court-martial composed of officers and enlisted members, or military judge alone. Petitioner stated only that he understood these options and his counsel requested to delay forum selection. The military judge agreed. Record at 6.

At a pre-trial session on March 24, 1993, the judge

and one of Petitioner's defense counsel discussed a written request for trial by enlisted members signed by defense counsel. Petitioner did not sign this request and he did not indicate that he had discussed the request with counsel or otherwise concurred with it. Petitioner was present but was not questioned at all during this session. Record at 69.

On April 8, 1993, one of Petitioner's defense counsel informed the military judge that "at this time we make a formal election for officer and enlisted members." Record at 72. The military judge accepted this election without personally questioning the Petitioner regarding his desire to have enlisted members on the court. Petitioner also never signed any written request for trial by enlisted members.

On May 11, 1993, the military judge and counsel conducted *voir dire* in the Petitioner's presence. The original panel consisted of five enlisted members and six officers. Two enlisted and one officer member were excused after challenges. The eight remaining members heard a 10-day contested case on the merits and in sentencing. Petitioner was present during each of the sessions.

When the issue regarding the personal election of enlisted members was submitted on appeal to the Navy-Marine Corps Court of Criminal Appeals (NMCCA), the NMCCA ordered an evidentiary hearing to determine what Petitioner's intentions were regarding forum selection at the time of trial. The hearing was held on May 3, 1997.

Petitioner testified that he did not recall making any choice as to forum or selecting the option for himself. When asked directly if he, at the time of trial, desired enlisted members, he answered that he did not recall. There is nothing in the record of trial indicating that Petitioner had ever discussed the ramifications of electing trial by enlisted members with counsel.

The NMCCA reversed because Petitioner never personally requested enlisted members, either orally or in writing. *Townes*, 50 M.J. at 766. The NMCCA held, in

accordance with precedent, that Congress clearly intended the election of enlisted members to be made personally by the accused and that failure to comply with the congressional mandate constituted jurisdictional error. *Townes,* 50 M.J. at 765 (citing *United States v. Brandt,* 20 M.J. 74 (C.M.A. 1985)).

The USCAAF set aside the NMCCA's decision on March 8, 2000. *United States v. Townes,* 52 M.J. 275 (1999). The USCAAF held that there was error in the selection of trial by enlisted members but that the error was not jurisdictional. *Townes*, 52 M.J. at 276.

REASONS FOR GRANTING THE PETITION

The USCAAF erred in holding that a court-martial composed of enlisted members had jurisdiction to try Petitioner where there was no personal request for trial by enlisted members as required under Article 25, UCMJ.

This Court has held, in reference to the appointment of statutorily disqualified members of a court-martial: "[W]hen in appointing such members [the convening authority] violates the statute, as in this case, by appointing men to the court that the statute says he shall not appoint, the body thus convened is not a legal court-martial, and has no jurisdiction . . . ." *McClaughry v. Deming*, 186 U.S. 49, 65 (1902).

As this Court explained: "It is difficult for us to understand how an ephemeral court, composed of men detailed in direct violation of the statute on that subject which prohibits their sitting, can obtain any jurisdiction over the subject-matter or person even by the consent of the defendant."[1] *McClaughry*, 186 U.S. at 65.

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[1] "But it is said defendant did not object to being tried by this illegally constituted court, and that his consent waived the

A court-martial "is a mere creature of the statute. . . and must be created under its provisions. It is a special body convened for a specific purpose and when that purpose is accomplished its duties are concluded and the court is dissolved." *McClaughry,* 186 U.S. at 64. In short, a court-martial is "wholly unlike the case of a permanent court created by constitution or by statute . . ." *McClaughry*, 186 U.S. at 64. For jurisdiction to attach, a court-martial "must be convened and constituted in accordance with the law." *McClaughrey*, 186 U.S. at 62.[2]

This Court's views of the fundamental nature of courts-martial have remained unchanged. A court-martial remains "a special statutory tribunal, with limited powers . . . unless facts essential to sustain its jurisdiction appear, it must be held not to exist." *Collins v. McDonald*, 258 U.S. 416, 418 (1922). This Court has found "nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts . . ." *Toth v. Quarles*, 350 U.S. 11, 17 (1955).

Moreover, in light of Congress' express constitutional authority to regulate the Armed Forces and the unique nature of the military's mission, this Court has "afforded an unparalleled degree of deference to congressional action

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question of invalidity. We are not of that opinion. It is not a mere consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed. His consent could no more give jurisdiction to the court ... than if it had been composed of a like number of civilians..." *McClaughrey*, 186 U.S. at 66.

[2] *Cf. Runkle v. United States*, 122 U.S. 543, 555-56 (1887)("A court-martial organized under the laws of the United States is a court of special and limited jurisdiction....To give effect to its sentences, it must appear **affirmatively and unequivocally** that the court was legally constituted....There are no presumptions in its favor so far as these matters are concerned ....The facts necessary to show their jurisdiction...must be stated positively; **and it is not enough that they be inferred argumentatively**.") (emphasis added).

governing the military". *Loving v. United States*, 517 U.S. 748, 778 (1996)(Thomas, J., concurring). Accordingly, given Congress' plenary authority over regulations, procedures, and remedies related to military discipline, a court's deference must be "at its apogee" when reviewing the delicate balance struck by Congress between the rights of service members against the needs of the military. *Weiss v. United States*, 510 U.S. 163, 176-178 (1994).

Congress has given military accused an absolute right against having enlisted members serve on courts-martial, "unless the accused has **personally** requested orally or the record or in writing that enlisted members" serve on the court.[3] Art. 25(c)(1), UCMJ (emphasis added). The provision reflects clear congressional intent that an accused "personally makes that choice and doesn't delegate it to anyone else -- counsel or otherwise." Hearings before House Armed Services Committee on H.R. 2489, 81st Congress, 1st Session, page 1147.

The nondelegability of the choice reflects Congress' express determination "that **the right is so important** ...." that the accused himself exercise it and not allow his attorney to do so, despite the attorney's being authorized "to do many things as the agent of his client." *Id.* (emphasis added).[4] In the absence of an accused's personal request,

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[3] An accused's personal request for enlisted members may be denied if such members cannot be obtained "on account of physical conditions or military exigencies." Art. 25(c)(1), UCMJ.

[4] Contrary to the USCAAF's opinion, Congress did **not** view the personal election of enlisted members as a mere procedural technicality to be observed as part of a military judge's administrative "housekeeping". The provision at issue in Petitioner's case has its legislative genesis in a recommended amendment to the Articles of War to provide for the personal election of trial by enlisted members, with the failure to elicit a personal election constituting a jurisdictional error. Congress

enlisted members are disqualified from serving on courts-martial and the court must be composed solely of officers.[5]

The plain language and clear intent of Article 25(c)(1), UCMJ, has long been upheld by military courts. *See e.g. United States v. White,* 21 U.S.C.M.A. 583, 45 C.M.R. 357, 359-362 (1972); *Gallagher v. United States*, 22 U.S.C.M.A. 191, 46 C.M.R. 357 (1973); *United States v. Landrum*, 3 M.J. 160 (C.M.A. 1977). In each instance Congress was on notice of the military courts' strict application of the statute and took no action to relax its requirements.

The USCAAF last addressed the issue directly in *United States v. Brandt*, 20 M.J. 74 (C.M.A. 1985). *Brandt* recounted "clear congressional intent" that Article 25 was enacted to ensure the personal election of trial by enlisted members. *Brant* noted that "it might be tempting" to overrule prior cases holding that the absence of a personal election was jurisdictional error. *Brant*, 20 M.J. at 77. The court noted, however, that the choice "is for Congress" and not for the court. *Id.*.

Shortly thereafter, Congress did amend Article 25, adding a means through which an accused's personal election

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deemed personal election of enlisted members by the accused vital to ensuring an accused's substantive rights. Congress made this determination based on evidence that the enlisted ranks themselves did not favor enlisted members serving on courts-martial due to the perceived unfairness of enlisted members and their vulnerability to unlawful command influence. An enlisted accused might nonetheless feel pressured into selecting trial by enlisted members because "it would be a reflection one way or the other on him – on his being guilty or innocent." The legislative origins of trial by enlisted members under Article 25, UCMJ, as described above, are set out in greater detail at *United States v. White*, 21 U.S.C.M.A. 583, 45 C.M.R. 357, 359-62 (1972).

[5] Alternately, an accused has a conditional right to request trial by military judge alone. Art. 16(1)(B), UCMJ.

could be expressed, namely, "orally on the record". Pub. L. No. 99-661, § 803(a), 100 Stat. 3906 (1986). Significantly, Congress retained the requirement that the election be "personally" made. Thus, the meaning and intent of the statute is clearer than ever.

Based on this Court's decision in *McClaughry,* the conclusion that a violation of the provision must result in the affected findings and sentence is no less clear. The lack of a personal election by the accused gives rise to a statutory disqualification against enlisted persons serving as members of the court-martial. The participation of these statutorily disqualified members is so fundamental a flaw that the proceedings are rendered a nullity. The USCAAF's adoption of a "close enough for government work" construction of Article 25 and its impact on court-martial jurisdiction is contrary to the will of Congress and inconsistent with the historical and constitutional foundations of courts-marital.

Furthermore, in Petitioner's case the error's impact is not merely theoretical. After challenges, the panel consisted of eight members: five officers and three enlisted members. *Townes,* 52 M.J. at 276. Because findings of guilty would have required a vote of at least six members[6], then the findings necessarily were the product of at least one enlisted person whose participation was statutorily prohibited.

The error of the USCAAF's decision is also dramatically reflected in its practical impact. USCAAF's decision abandons Article 25's "bright line" approach to the lack of a personal request for enlisted members for a "case-by-case" analysis of the prejudice accruing from such error. As a result, when a personal election of trial by enlisted members is absent from the record, the military Courts of Criminal Appeals have compelled the accused and counsel to divulge the substance of attorney-client communications regarding forum selection in an attempt to fill the void. *See e.g. United States v. Nehring*, No. 9700342 (Army Ct. Crim

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[6] *See* Art. 52(a)(2), UCMJ (requiring vote of two-thirds of the members present to convict).

App. 26 Mar 99)(unpublished interim order subjecting accused and counsel to questions regarding forum selection),(Appendix C) *writ appeal denied*, 2000 CAAF LEXIS 330 (C.A.A.F. Mar. 28, 2000)(denying appeal as "moot" in light of *Townes*, 52 M.J. 275 (2000))(Appendix D).

CONCLUSION

A military accused's decision whether to request trial by enlisted members is one of the most important decisions he makes at trial. Because of the significant differences in experience, education, and relationship to military authority between enlisted members and officers, enlisted members bring a unique perspective that can be either beneficial or prejudicial to an accused. In recognition of the impact the participation of enlisted members have on the substantive rights of a military accused, Congress enacted Article 25, UCMJ, to ensure that enlisted members were disqualified from courts-martial unless the accused personally requested their presence.

The USCAAF was clearly incorrect when it disregarded Congress' mandate under Article 25, UCMJ, and this Court's decision in *McClaughry* to find that the participation of enlisted members in Petitioner's court-martial, without his personal request, was not jurisdictional error. The USCAAF's decision in Petitioner's case threatens the substantive rights afforded service members by Congress under the UCMJ and alters the fundamental nature of court-martial jurisdiction as defined by this Court. Upon the 50th anniversary of the UCMJ, it is fitting that the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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June 2000

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 99-5004

Crim.App. No. 95 00849

Kevin TOWNES, Staff Sergeant
U.S. Marine Corps, *Appellee*

v.

United States, *Appellant*

Argued Dec. 9, 1999
Decided Mar. 8, 2000

For Appellee: *Lieutenant Commander R. C. Klant*, JAGC, USN (argued).

For Appellant: *Lieutenant Margaret E. Jolly*, USN (argued); *Colonel Kevin M. Sandkuhler*, USMC, and *Commander Eugene E. Irvin*, JAGC, USN (on brief).

Opinion of the Court

CRAWFORD, Judge:

Pursuant to his pleas, appellee was convicted of unauthorized absence, rape, forcible sodomy, and various charges relating to the molestation of a child, in violation of Articles 86, 120, 125, and 134, Uniform Code of Military

Justice, *10 USC* § § *886*, 920, 925, and 934, respectively. Contrary to his pleas, a panel of officer and enlisted members convicted appellee of non-capital premeditated murder and assault and battery, in violation of Articles 118 and 128, UCMJ, *10 USC* § § *918* and 928, respectively. The convening authority approved the sentence of a dishonorable discharge, confinement for life, total forfeitures, and reduction to the lowest enlisted grade. The Court of Criminal Appeals set aside the contested charges and specifications and authorized a rehearing. *50 M.J. 762, 766 (1999).*

The Judge Advocate General certified the following issue to this Court:

WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT STAFF SERGEANT TOWNES' FAILURE TO PERSONALLY SELECT ENLISTED MEMBERS WAS JURISDICTIONAL ERROR RATHER THAN PROCEDURAL ERROR THAT SHOULD BE TESTED FOR SUBSTANTIAL COMPLIANCE.

We hold that the judge erred in not obtaining on the record appellee's personal request for a trial by enlisted members. However, under the circumstances of this case, there was substantial compliance with Article 25, UCMJ, *10 USC* § *825*, and the error by the judge did not materially prejudice the substantial rights of appellee. Art. 59(a), UCMJ, *10 USC* § *859*(a). Thus, we answer the certified question in the affirmative.

FACTS

At a session under Article 39(a), UCMJ, *10 USC* § *839*(a), on February 10, 1993, appellee was advised of his rights concerning trial by a court-martial composed of officer and enlisted members and a trial by judge alone, and

appellee stated that he understood his options. On March 24, 1993, the judge and the trial defense counsel discussed a written request for a trial by enlisted members. This request was not signed by appellee. A few days later in appellee's presence, trial defense counsel informed the judge that "at this time we make a formal election for officer and enlisted members." On May 11, 1993, with members present, a lengthy voir dire occurred in the presence of appellee. The original panel consisted of 5 enlisted members and 6 officers. After excusal of two enlisted and one officer member, the eight members heard a 10-day contested case. Appellee was present and participated by testifying before the members an entire day. Appellee was also present during the instructions to the members and during the sentencing proceedings.

During the post-trial hearing on this issue which was ordered by the court below 4 years after the court-martial, neither appellee nor his counsel objected to the composition of the court-martial. When specifically asked whether he had elected officer and enlisted members, appellee stated he did not know and did not remember.

The Court of Criminal Appeals reversed because there was neither a personal oral request nor a written request by appellee. *50 M.J. at 764*. The court noted that the approach taken in *United States v. Turner, 47 M.J. 348 (1997)*, and *United States v. Mayfield, 45 M.J. 176 (1996)*, was "appealing." The Court, however, believed it was bound by prior precedent, i.e., *United States v. Brandt, 20 M.J. 74, 77 (CMA 1985)*(Congress intended the election of enlisted members be made by the accused in writing and signed personally by the accused). As a basis for its decision, the Court cited *United States v. Kelly, 45 M.J. 259 (1996). 50 M.J. at 765*.

DISCUSSION

There are two questions presented: first, was there error; and second, was it jurisdictional? We answer the first question in the affirmative and the second question in the negative.

Article 25(c)(1) now authorizes enlisted panel members if "before the court is assembled for the trial of the accused, the accused personally *has requested orally on the record or in writing* that enlisted members serve on it." (Emphasis added.)

Shortly after the holding in Brandt, Congress struck the prior language "has requested in writing" in favor of the underlined language. Pub. L. No. 99-661, § 803(a), 100 Stat. 3906 (1986). In passing this provision, the House Report noted that it "is similar to the provision in the Military Justice Act of 1983 authorizing oral requests to be tried by a military judge sitting without a jury." H.R. Rep. 718, 99th Cong., 2d Sess. 225 (1986). This House Report refers to the parallel between Article 16(1)(B) and Article 25(c)(1). Both Article 16 and Article 25 require personal election by the accused as to the forum.

In remarking on the provision for enlisted members, the committee noted that an accused "personally makes that choice and does the signing personally and doesn't delegate it to anyone else -- counsel or otherwise." Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. 1147 (1949). This Court has strictly enforced this provision. *United States v. Brandt, supra; United States v. Landrum, 3 M.J. 160 (1977); United States v. White, 21 U.S.C.M.A. 583, 45 C.M.R. 357 (1972).*

We believe that failure to comply with Article 25 in this case, however, was not jurisdictional because there is

sufficient indication by appellee orally and on the record that he personally requested enlisted members. Appellee had been advised of his rights concerning the forum. After delaying this election for a few days, defense counsel in appellee's presence noted appellee's desire to be tried by an officer and enlisted panel. Two months later an officer and enlisted panel was impaneled subject to lengthy voir dire. After the members were sworn, the trial continued for 10 days, consisting of 35 sessions. Appellee testified for an entire day before the court members.

There is no allegation of coercion or that appellee was incompetent to make a knowing and intelligent decision. As we said in Turner, supra at 350, "the record of trial as a whole makes clear that the selection was the accused's choice, and that the error . . . did not materially prejudice the substantial rights of the accused." This does not, however, relieve judges of their obligation to obtain a personal election by the accused on the record.

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy for submission to that court for further review.

CONCUR BY:
SULLIVAN

CONCUR:

SULLIVAN, Judge (concurring in the result):
Common sense in trial practice must prevail again. *United States v. Turner, 47 M.J. 348, 351 (1997)* (Sullivan, J., concurring in the result). In this case, appellee stood next to his counsel as his attorney asked for the jury to be composed of one-third enlisted members. This request on

the record followed other on the record discussions about this matter and an "on the record" affirmation by appellee of his knowledge of his right to an enlisted section of the jury. I would hold as I did in *United States v. Turner, supra* ("substantial compliance" with Article 16 -- the right to trial by judge alone) that there was substantial compliance with Article 25 in the present case. Appellee was present and knowledgeable when his attorney asked for enlisted members. Appellee got enlisted members for his trial. I find his technical attack on the jury's verdict must fail. Fairness and common sense, not technicalities, should rule the law. *United States v. Turner, supra;* see *United States v. Mayfield, 45 M.J. 176, 177-78 (1996); United States v. Yates, 28 M.J. 60 (CMA 1989); United States v. Jette, 25 M.J. 16 (CMA 1987).*

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

R.B. LEO. D.A. ANDERSON
CAROL J. COOPER

UNITED STATES

v.

Kevin TOWNES, 212 70 4288
Staff Sergeant (E-6), U.S. Marine Corps

NMCM 95 00849 Decided 28 April 1999

Sentence adjudged 26 May 1993. Military Judge: R.W.G. Grove. Review pursuant to Article 66(c), UCMJ, of General court-martial convened by Commanding General, 1st Marine Division (Rein), FMF, Camp Pendleton, CA.

LCDR HOWARD B. GOODMAN, JAGC, USN, Appellate Defense Counsel
LCDR ROBERT C. KLANT, JAGC, USN, Appellate Defense Counsel
LT MARGARET E. JOLLY, JAGC, USNR, Appellate Government Counsel
Capt CHRISTOPHER N. HAMILTON, USMC, Appellate Government Counsel
LCDR PAUL JONES, JAGC, USNR, Appellate Government Counsel

COOPER, Judge:

The appellant was convicted, by general court-martial composed of enlisted and officer members, of unauthorized absence, premeditated murder, rape of a child, forcible sodomy of a child, assault and battery, and two specifications of indecent acts with a child in violation of Articles 86, 118(1), 120, 125, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 918(1), 920, 925, 928, and 934 (1994). Appellant pled guilty to the unauthorized absence offense and all charges relating to the molestation of the child. The members found him guilty of premeditated murder and assault consummated by battery. The sentence adjudged was confinement for life,[1] total forfeiture of pay and allowances, reduction to paygrade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have carefully examined the record of trial, the appellant's ten assignments of error, the Government's responses, and the excellent oral arguments of counsel. We conclude that the first assignment of error, absence of jurisdiction, has merit. We find that the court-martial lacked jurisdiction to try the contested charges because the appellant did not personally elect trial with enlisted members. Because of our findings on this assignment of error, we have not addressed the other nine. Arts. 59(a) and 66(c), UCMJ.

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[1] Confinement for life was the mandatory minimum sentence for the charge of premeditated murder.

FACTS SURROUNDING THE REQUEST FOR ENLISTED MEMBERS

At the initial Article 39(a), UCMJ, session on 10 February 1993, the appellant was advised by the military judge of his forum rights, including his right to be tried by a court-martial composed of at least one-third enlisted personnel. Record at 6. The appellant acknowledged that he understood these rights and requested to delay his forum selection. The military judge agreed. Record at 6. On 10 March 1993, the military judge and defense counsel discussed possible trial dates and the expected length of the trial. Included in their computations was a day for seating members. The appellant was present at this session. Record at 29. On 24 March 1993, the military judge and the defense counsel discussed that the appellant was contemplating enlisted members as his forum selection. The appellant was not questioned during this discussion. Record at 69. On 8 April 1993, the trial defense counsel informed the military judge that "at this time we make a formal election for officer and enlisted members." Record at 72. The military judge accepted this election without personally questioning the appellant regarding his desire to have enlisted personnel on the members panel. *Id.* There was no written request for trial by enlisted members that had been signed by the appellant.

This was a vigorously litigated case with multiple pretrial sessions and motions. Preliminary sessions were held on 10 February, 10 and 24 March, and 8 and 29-30 April 1993. The first 276 pages of the record of trial concern these motions. During the litigation of at least one of the motions, the issue of the potential for some prejudicial effect on the members and the inadequacy of a limiting instruction to the members was discussed. Record

at 43, 50-51. The appellant was present during each preliminary session. On 11 May 1993, the members were present and lengthy voir dire occurred. The original panel included five enlisted persons and four officers. Record at 277-394. There were two enlisted members whose qualifications were discussed and who were excused for cause. Record at 394-96. The defense exercised one preemptory challenge against an officer member, leaving a panel of three officers and three enlisted persons. Record at 397. The members heard the case on the merits and sentencing from 17-26 May 1993. The appellant was present during each of the sessions. Record at 450-1325.

When the issue regarding the personal election of enlisted members was submitted to this court, we ordered an evidentiary hearing held to determine what the appellant's intentions were regarding forum selection at the time of trial. *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967). NMCCA Order of 14 March 1997. This hearing was held on 3 May 1997. The appellant testified that he did not recall making any choice as to forum, or selecting the option for himself. Although he recalled attending the trial, he did not recall the procedures of the incidents leading up to the *DuBay* hearing. When asked directly if he, at the time of trial, desired enlisted members, he answered that he did not recall.[2] Record at 25-28.

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[2] The relevant portions of that hearing are as follows:

MJ: Again, was it, in fact, your desire as your defense counsel indicated on 8 April 1993 to be tried by enlisted members rather than have your case heard by military judge alone or only officer members?

ACC: Sir, I don't recall what my choice was. I don't recall making any choice as to either of the two or the three. I'm still having a problem understanding what you are saying as far as enlisted, officer. I understand the judge alone, but I don't recall having the choice to make either of those options, sir.

. . . .

ACC: See, sir, I never told anybody personally I wanted judge alone or I wanted a panel. I never actually made that option for myself. I understand exactly [what] you are saying. I'm reading this and I'm following it and I don't have a problem actually comprehending the substance of the words in here, but what I'm trying to get across to you, sir, is that I never made the choice personally on how I was to be tried.

. . . .

MJ: You don't recall what your desire was with regard to forum?

ACC: Negative, sir. I do not recall.

. . . .

MJ: Was your defense counsel wrong when he said we make a formal election for officer and enlisted members?

ACC: Sir, I don't recall that. I don't want to say he was wrong. I just don't recall the actual incident being forwarded to me.

. . . .

MJ: Then one last question. I can ask this question a number of different ways but since it is in the order, let me ask it directly from the order.
Did you desire to be tried by enlisted members?

Jurisdiction

The issue of jurisdiction is a matter of law that we review *de novo*. *United States v. Ayala*, 43 M.J. 296 (1995). *See also United States v. Koseck*, 41 M.J. 60 (C.M.A. 1994).

> Article 25(c)(1), UCMJ, states in pertinent part: Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of a armed force . . . , if, . . . before the court is assembled for the trial of the accused, the accused **personally** has **requested orally** on the record **or in writing** that enlisted members serve on it. (Emphasis added.)

The record is clear that the appellant did not personally request, either orally or in writing, that enlisted members serve on his court-martial, but that his trial defense counsel did so on his behalf. The question before us then is whether Article 25, UCMJ, mandates that the appellant must actually do this himself or whether the election can be made for him through counsel. We find that the appellant must do so himself and the act of making the request cannot be delegated.

ACC: I don't recall, sir.

Record at 25-27.

Discussion

The appellant argues that this court is bound by our superior Court's ruling in *United States v. Brandt*, 20 M.J. 74 (C.M.A. 1985), and the cases which preceded it: *United States v. White*, 21 C.M.A. 583, 45 C.M.R. 357 (1972), *Gallagher v. United States*, 22 C.M.A. 191, 46 C.M.R. 191 (1973) and *United States v. Landrum*, 3 M.J. 160 (C.M.A. 1977)(summary disposition). The appellant also argues that (1) the requirement for an accused to **personally** make the request for enlisted members either orally or in writing is a jurisdictional requirement; and (2) failure to adhere to that requirement resulted in a court-martial tribunal that was not authorized by law to enter a judgement as to the contested charges and the sentence. Appellant's Brief of 18 Apr 1996 at 20. During oral argument, the appellant also asserted that having ineligible members deciding his case materially prejudiced his substantial rights, citing Article 59(a), UCMJ.

The Government asks us to distinguish *Brandt* and apply the rationale of *United States v. Turner*, 47 M.J. 348 (1997) and *United States v. Mayfield*, 45 M.J. 176 (1996). This approach is appealing. If this were a case of first impression, we would view the election of enlisted members as an election of an affirmative right and the method of making the election, i.e., having the accused personally elect either orally or in writing, as only the procedure used to make this election. The appellant was present when the enlisted members were questioned during voir dire and was present when two of those members were excused for cause. He knew that the panel of members who were deciding his fate consisted of both officer and enlisted persons. The trial on the merits and sentencing was held over a 10-day period, and the appellant never once

voiced a complaint as to the composition of the court-martial. As in *Turner*, there has been no allegation that he was coerced or was incompetent to make a knowing and intelligent waiver of his right to all officer members. *Turner*, 47 M.J. at 350. Although he now states that he does not remember ever making an election as to forum and does not know what his desires were at the time, he has never said that the election was made contrary to his desires. Record of *DuBay* hearing of 3 May 1997. The appellant has not raised the issue of ineffective assistance of counsel, and we presume that his counsel was competent. *Strickland v. Washington*. 466 U.S. 668, 689 (1984). We also assume that, as an officer of the court, the trial defense counsel did not knowingly misrepresent the intentions of the appellant before the court-martial. If we were to take this approach, we would find that there was substantial compliance with Article 25, UCMJ, and no material prejudice to the appellant's substantial rights.

However, this is not a case of first impression. The facts of appellant's case fit squarely within the four corners of the decision in *Brandt*. We do not believe it can be factually distinguished, and thus we are not at liberty to overturn that precedent. *United States v. Kelly*, 45 M.J. 259 (1996); *United States v. Allbery*, 44 M.J. 226 (1996). In *Brandt*, our superior court, citing *White* and the legislative history of Article 25, UCMJ, made it clear that Congress intended the election of enlisted members be made by the accused. This election had to be made in writing and signed personally by the accused. His counsel could not act for him. *Brandt*, 20 M.J. at 76. Our superior Court, then the Court of Military Appeals, noted in *Brandt* that, although it might be tempting to overrule *White* and allow this personal election to be waived, they could not do so. *Brandt*, 20 M.J. at 77. It noted that Congress was on

notice as to the Court's application of Article 25(c)(1), UCMJ, when it made statutory changes and amended Article 16, UCMJ, in 1983.[3] The Court of Military Appeals stated that it must "stand fast until Congress decides to amend . . . Article [25, UCMJ] *Brandt*, 20 M.J. at 77.

In 1986, Congress did amend Article 25, but the amendment substituted the words "has requested orally on the record or in writing" for "has requested in writing." Pub. L. No. 99-661, § 803 (a), 100 Stat. 3906 (1986). The amendment did not delete the word "personally." Thus the appellant's case is the first Article 25, UCMJ, case before us since the 1986 amendments. In our review of the legislative history of Article 25, UCMJ, it seems clear that Congress originally made a distinction between the affirmative right to elect trial by military judge alone and the right to request trial with enlisted members. Congress later amended Article 25, UCMJ, but changed only the wording regarding how the election is made, *i.e.*, it could be made orally as well as in writing, and did not delete the requirement for an accused to **personally** make this election. S. Rep. No. 99-331, at 249 (1986), reprinted in 1986 U.S.C.C.A.N. 6444. A significant distinction appears between the wording of Articles 16 and 25, UCMJ -- which indicates that Congress affirmatively intended to keep the safeguard for an accused. This is the rationale of *Brandt*, and until our superior Court tells us otherwise, we find that the failure of the military judge to obtain

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[3] The 1983 amendments allowed the request for a trial by military judge to be made either orally or in writing. When this change was made, Congress made no change to Article 25, UCMJ. Pub. L. No. 98-209, § 3(a), 97 Stat. 1394 (1983).

personally from the appellant, either orally or in writing, his election of enlisted members was jurisdictional error. Corrective action is required. Cf. *U.S. v. Lanier*, ACM 9700598 (A.CT.Crim. App. 2 Apr 1999) slip op. at 9.

We note that the appellant did plead guilty to some of the charges and specifications.[4] The providence inquiry was properly conducted of those charges and findings of guilty to those offenses were properly announced by the military judge. The findings as to those charges and specifications are not affected by the improper composition of the members panel and need not be disturbed. *United States v. Dixon*, 18 M.J. 310 (C.M.A. 1984).

Conclusion

Accordingly we affirm the findings as reviewed below as to Charge I and its specification, Charge IV and its specification, Additional Charge I and its sole remaining specification, Additional Charge II and its specification, and Additional Charge III and its specification. We set aside the findings as to Charges II and III and their specifications.[5] We also set aside the sentence. A

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[4] None of the appellant's assignments of error addressed the findings as to the charges and specifications to which he pled guilty.

5 The charges against appellant were as follows:

Charge I - Article 86-Unauthorized absence
Charge II - Article 118-Premeditated Murder
Charge III - Article 128-Assault consummated by a battery

rehearing on the charges set aside and the sentence is authorized.

Senior Judge LEO concurs.

ANDERSON, Judge (dissenting):

In light of our superior court's reasoning in *United States v. Turner*, 47 M.J. 348 (1997), I find no reversible jurisdictional error in the manner of forum selection in this case.

At the appellant's original Article 39(a), UCMJ, session, the military judge explained his rights to a trial with members, to include a trial with members of one-third enlisted composition, or to a trial by judge alone. After this advice, the appellant confirmed that he understood his rights and that he had discussed the choices with his defense counsel. His counsel then asked to defer the selection of court composition to a later time. At another pretrial session a month later, the defense counsel informed the military judge that the defense had notified the Government in writing of its desire to have a trial with enlisted members. Several weeks later, at another pretrial session, the defense counsel, acting on behalf of and in the presence of the appellant, formally announced the election of trial by officer and enlisted members. The appellant did not object

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Charge IV - Article 134-Indecent acts with a child

Additional Charge I - Article 120-Rape (of the child)
Additional Charge II - Article 125-Forcible sodomy of a child
Additional Charge III - Article 134-Indecent acts with a child

at the time or in any manner at any time throughout the lengthy trial. In addition, the appellant did not object at the time of the convening authority's action, and even after a *Dubay* hearing on the subject, he has never contradicted his counsel's representation to this date. No allegation has been made that he was coerced or was incompetent to make a knowing and intelligent decision.

Although I find a technical violation of Article 25, UCMJ, I find it to be a nonjurisdictional procedural error, and I find substantial compliance with that Article. Furthermore, I conclude that the error did not materially prejudice the substantial rights of the appellant. Art. 59(a). Common sense dictates no other result.

Accordingly, I respectfully dissent.

APPENDIX C

U.S. COURT ARMY COURT OF CRIMINAL APPEALS
Before
TOOMEY, TRANT, and CARTER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private El ANTHONY L.NEHRING
United States Army, Appellant

ARMY 9700342

ORDER

WHEREAS, the appellant filed a Brief on Behalf of Appellant on 7 April 1998;

WHEREAS, appellee filed a Brief on Behalf of Appellee on 4 February 1999;

WHEREAS, oral argument was heard before this Court on 24 March 1999;

WHEREAS, appellant has alleged in appellate brief and during oral argument that the record of trial does not indicate that he stated on the record his intent to be tried by a court-martial panel consisting of at least one-third enlisted members;

WHEREAS, the record of trial indicates that only appellant's trial defense counsel stated on the record that appellant requested a panel including enlisted members;

WHEREAS, appellant asserts that because he did not personally request, on the record, a panel that included enlisted members, in accordance with Article 25, UCMJ, and cases decided thereunder, his court-martial lacked jurisdiction to try him; and

WHEREAS, this Court is unable to resolve these issues, in this case, without an evidentiary hearing; it is by this Court, this date

ORDERED:

1. That the record of trial is returned to The Judge Advocate General for transmittal to an appropriate convening authority who shall order an evidentiary hearing before a military judge pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

2. That the hearing be conducted within sixty (60) days from the date of this order;

3. That, at the hearing, the military judge will receive all available evidence in order to make specific findings of fact concerning the allegations noted above.

4. That the military judge permit the presentation of witnesses and evidence, make rulings as appropriate, and enter findings of fact and

conclusions of law with respect to the following questions:

a. Whether appellant's counsel advised appellant of his forum selection choices prior to or during the court-martial;
b. Whether appellant made a personal decision regarding forum choice, and the nature of that decision;
c. Whether appellant conveyed such decision to his military defense counsel and/or the military judge; and
d. Whether appellant's counsel correctly advised the military judge of appellant's personal decision concerning forum selection.

5. That at the conclusion of the proceedings, the record, with an authenticated verbatim transcript of the hearing, be returned to this Court for further review.

DATE: 26 March 1999

FOR THE COURT:

JOSEPH A. NEURAUTER
Clerk of Court

APPENDIX D

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 99-8028/AR

United States, *Appellee*

v.

Anthony L. Nehring, *Appellant*

March 28, 2000, Decided

OPINION: On further consideration of the writ appeal filed in the above-entitled case, we note that the issue specified in our order of November 3, 1999, has been decided by *United States v. Townes*, 52 MJ 275 (2000). Review of the original issue regarding the attorney-client privilege raised in the writ-appeal petition was not granted in our November 3 order. The writ appeal is now moot. Accordingly, it is ordered that the decision of the United States Army Court of Criminal Appeals denying the petition for extraordinary relief is affirmed. The abatement of direct review under Article 66, Uniform Code of Military Justice, 10 USC § 866 (1994), is no longer in effect. Following such review, Article 67, UCMJ, 10 USC § 867 (1994), will apply.

(2)

99-1965

No.

In The

Supreme Court of the United States

October Term, 1999

Supreme Court, U.S.
FILED
JUL 6 2000
CLERK

STAFF SERGEANT KEVIN TOWNES, USMC,
Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF *AMICUS CURIAE*
U.S. ARMY DEFENSE APPELLATE DIVISION
IN SUPPORT OF PETITIONER

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STATUTES AND RULES:

10 U.S.C. § 825(c)(1), Uniform Code of Military Justice [UCMJ] Article 25 ..... *passim*

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1999

STAFF SERGEANT KEVIN TOWNES, USMC,
Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

BRIEF OF *AMICUS CURIAE* U.S. ARMY DEFENSE APPELLATE DIVISION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The U.S. Army Defense Appellate Division files this brief in support of the U.S. Navy-Marine Corps Appellate Review Activity Defense Division's Petition for a Writ of Certiorari.[1]

The U.S. Army Defense Appellate Division represents individual soldiers who have been convicted by court-martial and who have been adjudged either a punitive discharge or confinement for one year or more. Defense Appellate Division counsel represent these individuals at the Army Court of Criminal Appeals

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[1] Counsel for U.S. Army Defense Appellate Division, Major Jonathan Potter, certifies that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of the brief.

(ACCA); the Court of Appeals for the Armed Forces (USCAAF); and the Supreme Court of the United States.

Several soldiers represented by the Army Defense Appellate Division claim on appeal that their court-martial did not have jurisdiction because they never personally selected to be tried by a court-martial composed of enlisted members, as required by Article 25, Uniform Code of Military Justice (UCMJ). Rather than finding jurisdictional defect, appellate courts have ordered fact-finding inquiries to discover what advice the convicted soldier received from his trial defense counsel and what the convicted soldier communicated to his trial defense counsel regarding which forum he desired. Such fact-finding inquiries impermissibly pierce confidential attorney-client communications.

Amicus is concerned that the USCAAF's holding that "substantial compliance" with Article 25 (where a defense counsel elects the forum for an accused) will lead to never-ending occasions where the attorney-client veil must be pierced. Currently, *amicus* has eleven cases pending before the Army Court of Criminal Appeals in which an accused who was tried by a panel of enlisted members did not personally select such a panel in accordance with Article 25.[2] In five of these cases the trial defense counsel was ordered to testify despite

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[2] *United States v. Daniels*, Army Court of Criminal Appeals (Army) Docket No. 9500822; *United States v. Morgan*, Army Docket No. 9601890; *United States v. Richards*, Army Docket No. 9700809; *United States v. Nehring*, Army Docket No. 9700342; *United States v. McGee*, Army Docket No. 9700480; *United States v. Robinson*, Army Docket No. 9700852; *United States v. Jeffery*, Army Docket No. 9700955; *United States v. Andeozzi*, Army Docket No. 9800870; *United States v. McKnight*, Army Docket No. 9800871; *United States v. Urbina*, Army Docket No. 9801405; *United States v. Reed*, Army Docket No. 9801750.

invoking the attorney-client privilege.[3] Evidentiary hearings have not yet been ordered in three of these cases; it is likely that trial defense attorneys will invoke the privilege in these cases as well.

SUMMARY OF ARGUMENT

Article 25, UCMJ's bright line requirement that a military judge elicit an accused's personal selection of a court-martial panel consisting of enlisted members ensures that an accused has indeed decided to be tried by such a forum. Influences unique to military service, specifically the deference to superiors and unflinching obedience to orders, require this protective measure. *Amicus* cites one client who perceived a court-martial convening order (which included a panel of enlisted members) as an order from a general officer which made clear the general's decision that the accused would be tried by a panel of enlisted members, a decision from a superior officer which precluded the accused from making that decision. The accused listened obediently as the military judge and defense counsel discussed the forum options. He never personally selected the forum, as Congress intended. This case perfectly demonstrates the importance of complying strictly with Article 25, UCMJ.

In addition, allowing trial defense counsel to elect forum for an accused is inconsistent with Congressional intent and inherently leads to questions regarding whether the accused intended to be tried by that forum. When an accused later claims that the forum that heard his case was not the forum he desired, courts inherently turn to conversations between accused and trial defense counsel to determine whether the accused actually

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[3] *Nehring, Robinson, McGee, Jeffery* and *Morgan, supra.*

informed the trial defense counsel of his forum request. Such intrusions are not permitted. In enacting Article 25(c)(1), Uniform Code of Military Justice [UCMJ] 10 U.S.C. § 825(c)(1))(1994), Congress established a method that would prevent such intrusions: they required that an accused who is tried by enlisted members must have personally, either orally or in writing, selected that forum. Abiding by such a simple requirement easily prevents subsequent interference with confidential communications between attorney and client.

The privilege allows a client to prevent an attorney from disclosing confidential communications made between attorney and client. Although there are circumstances in which the privilege is either waived or does not apply, no such circumstances exist here. *Amicus* currently represents several clients whose trial defense attorneys were ordered to testify to the substance of confidential communications as a result of the failure to require an accused to personally select forum.

ARGUMENT

I. FAILURE TO ENFORCE THE REQUIREMENT THAT AN ACCUSED TRIED BY A PANEL OF ENLISTED MEMBERS MUST PERSONALLY SELECT SUCH A FORUM HAS DENIED SERVICEMEMBERS THE RIGHT TO BE TRIED BY A FORUM OF THEIR OWN SELECTION.

In enacting Article 25, UCMJ, Congress manifested a clear and unambiguous intent that an accused must personally select trial by enlisted members before that accused is tried by such a forum. *Amicus* currently represents soldiers who, because of circumstances unique to the military, were denied the right not to be tried by an

enlisted panel through the trial judge's failure to obtain the accused's personal forum selection decision.

A classic example of the failure of "substantial compliance" to protect a military accused's right to select enlisted members lies in *United States v. McGee*, No. 9700480 (Army Ct. Crim. App., unpublished opinion ordering evidentiary hearing, 14 July 1999)(Appendix A). In *McGee*, the Army Court of Criminal Appeals found that the record contained no evidence of an "on the record" request by the accused. *(McGee* at 2). In a post-trial affidavit, Sergeant First Class (SFC) McGee stated that although his counsel advised him of the various forum selection options, neither his defense counsel nor the military judge explained to him how forum selection would be effectuated. (Post-trial affidavit of Sergeant First Class McGee, 24 May 1999)(Appendix B). However, when SFC McGee was advised of his forum rights the day of trial, he believed that the convening authority, an Army Major General, had already decided how he would be tried and had made that decision known in the court-martial convening order. *Id.* SFC McGee stated that he "never questioned General Ernst's authority to issue the order" and that he "could not ... comprehend how any actions on [his] part could invalidate a General's orders." *Id.*

SFC McGee was a member of the elite Ranger regiment, a unit whose soldiers pride themselves on discipline and unflinching obedience to orders from the officers appointed to lead them.[4] When shown an

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[4] All those selected to be part of the Ranger regiment undergo extensive selection and training and abide by the "Ranger Creed," which provides, in pertinent part: "Gallantly will I show the world that I am a specially selected and well-trained soldier. My courtesy to superior officers ... shall set the example for others to follow." U.S. Army Student Handbook (SH) 21-76 (1992).

"order" from a general, SFC McGee believed that the General had decided that a panel consisting of enlisted members would hear the case. An attorney trained in military law knows that a court-martial convening order does not determine whether an accused will face trial by judge alone, or a panel consisting of officer or enlisted members. However, SFC McGee was trained not in military law, but in the fundamentals of tactics, discipline and obedience to orders. He understood the order as a decision regarding which officers and enlisted soldiers would hear his case. He did not question the order. He listened obediently as his defense counsel and the military judge discussed which forum would try him. *McGee, supra* at 5.

This scenario illustrates the dangers inherent in the USCAAF's failure to follow Congress' specific mandate that a military accused personally select enlisted members before being tried by such a forum. The reflexive obedience to orders and great deference to superiors that are absolutely essential to combat-readiness in the military may also prejudice a military accused unless measures are taken to prevent these qualities from encroaching on an accused's right to select forum. The bright line rule established by Congress in Article 25, UCMJ is such a preventive measure. However, USCAAF's failure to enforce the statute renders the statute ineffective to protect a military accused from the influences inherent in the military's hierarchical culture where obedience to orders and deference to superiors are indelibly ingrained into servicemembers.

Congress' intent was to require a military judge to elicit a military accused's personal election of an enlisted panel before that accused is tried by enlisted members.

This requirement protects the military accused from the dangers discussed above and ensures that the selection of forum is the personal selection of the accused.

II. FAILURE TO ENFORCE THE REQUIREMENT THAT AN ACCUSED TRIED BY A PANEL OF ENLISTED MEMBERS MUST PERSONALLY SELECT SUCH A FORUM HAS LED TO IMPERMISSIBLE INTRUSIONS INTO ATTORNEY-CLIENT COMMUNICATIONS.

a. The attorney-client privilege.

The Supreme Court has recognized the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law." *Upjohn v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981). The rationale for its existence was articulated long ago by the Supreme Court:

> [The privilege] is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

Hunt v. Blackburn, 128 U.S. 464, 470, 9 S. Ct. 125, 32 L. Ed. 488 (1888)(quoted in *Upjohn*, 449 U.S. at 389).

In the military, the attorney-client privilege exists pursuant to the Manual for Courts-Martial [M.C.M.], United States, Military Rules of Evidence (1998). Mil. R. Evid. 502 provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing

> confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, ...between the client ... and the lawyer ... (Mil. R. Evid. 502).

Advice concerning the forum choices that an accused has the right to make encompasses not only a recitation of the Manual for Courts-Martial, but necessarily includes which forum is most advantageous to a particular accused.

b. Failure to enforce Article 25 has led to unnecessary breaches of the attorney-client privilege.

When the Army Court of Criminal Appeals is faced with an accused who was tried by a court-martial panel which consisted of enlisted members and the accused did not personally select this forum, appellate courts have ordered limited evidentiary hearings to determine the accused's intent. Since a court cannot compel an accused to speak, *see Jenkins v. Anderson*, 447 U.S. 231, 235, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980), courts turn to the accused's trial defense attorney. *Amicus* currently represents several clients whose trial defense attorneys have been ordered to testify in limited evidentiary hearings regarding the discussions they had with their respective clients concerning forum selection. *United States v. Nehring*, No. 9700342 (Army Ct. Crim. App., 26 March 1999)(unpublished order requiring evidentiary hearing)(Appendix C), is such a case. In *Nehring*, the Army Court of Criminal Appeals ordered an evidentiary hearing to resolve, *inter alia*, whether the appellant's counsel advised appellant of his forum selection choices. During the hearing, the appellant (through counsel) objected to his trial defense attorney

testifying to any of the questions posed by the Army Court of Criminal Appeals. The appellant's counsel during the evidentiary hearing stated:

> [E]ach and every one of the questions that the appellate court wants you to try to answer, if [the appellant's trial defense counsel] were to testify specifically to those questions, it would violate the privilege because none of the communications between [counsel] and Private Nehring were ever intended to be disclosed at — to anyone ... [t]he right to make the election is right up until that moment in time that he makes the election. Everything else is purely ... advice and discussions leading to that, which are protected by the privilege.

(5 May 1999, Record of Evidentiary Hearing at 18, Nehring, Army Ct. Crim. App. No. 9700342.)

Limited evidentiary hearings conducted to ascertain the substance of communications between attorney and client are commonly ordered by the Army Court of Criminal Appeals. Including *Nehring, amicus* currently represents eight clients whose claims of jurisdictional error based upon the absence of a personal election of enlisted members resulted in such a hearing. *See United States v. Daniels*, No. 9500822 (Army Ct. Crim. App.); *United States v. Morgan*, No. 9601890 (Army Ct. Crim. App.); *United States v. McGee*, No. 9700480; *United States v. Richards*, No. 9700809 (Army Ct. Crim. App.); *United States v. Robinson*, No. 9700852 (Army Ct. Crim. App.); *United States v. Jeffery*, No. 9700955 (Army Ct. Crim. App.); *United States v. Reed*, No. 9801750 (Army Ct. Crim. App.). As long as the USCAAF refuses to enforce the plain-language requirement of Article 25 that an enlisted

panel be personally selected, ambiguity and inevitably more intrusions into attorney-client communications will result.

c. *Limited and clearly-defined circumstances in which the privilege does not apply do not exist here.*

The attorney-client privilege clearly applies to the communications that are the subject of these hearings. Further, the attorney-client privilege has not been waived with respect to any of these communications. In order for a communication to be protected by the privilege, it must be confidential. Mil. R. Evid. 502(a). A communication is deemed confidential

> if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Mil. R. Evid. 501(b)(4).

Communications made to an accused's attorney regarding forum selection are confidential. The attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *United States v. Upjohn*, 499 U.S. 383, 390, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). In this regard, the privilege not only protects an attorney's advice regarding forum selection, but whatever information, concerns and desires a client has regarding this important choice.

Further, there is no evidence that the clients in these cases intended for their attorney to disclose their forum selection choices to any third party. Indeed, Article 25, UCMJ provides that the decision is to be

made by the accused personally, and not through his attorney. We presume the understanding between attorney and client is that, although the client may communicate to his attorney his intention to select a panel of enlisted members, it is the *client*, not the attorney, who will ultimately communicate that to the court. Second, even if an accused informs his attorney that he intends to select a particular forum, that accused may change his mind up until the time that he is called upon by the judge to select forum. All communications leading up to that point are made in furtherance of the attorney rendering legal services, are not intended to be communicated to a third party, and are protected by the privilege.

Violations of the attorney-client privilege are easily prevented by enforcing the clear and unambiguous provisions of Article 25, UCMJ, which requires an accused to personally make forum selection. The Court should grant the Petition for Certiorari and should strike down the USCAAF's failure to enforce the statute.

CONCLUSION

The Court should see the importance of Article 25, UCMJ as preserving an accused's forum selection rights against influences inherent in military service. In addition, as long as appellate courts decline to enforce the strict, bright-line requirement of Article 25, UCMJ, that an accused personally select a panel of enlisted members, appellate courts will continue a barrage on the privileged communications between attorney and client. The Court should consider the impermissible intrusions into privileged communications a secondary,

but important, effect of the USCAAF's disregard of Congress' mandate in Article 25, UCMJ. The Court should therefore grant the Petition for Certiorari.

Respectfully submitted,

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ADELE H.ODEGARD
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APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before

SQUIRES, ECKER AND MERCK

Appellate Military Judges

UNITED STATES, Appellee

v.

Sergeant First Class LOWELL L. McGEE

United States Army, Appellant

ARMY 9700489

United States Army Infantry Center and Fort Benning

L.R. Dean, Military Judge

For Appellant: Colonel John T. Phelps II, JA; Colonel Adele H. Odegard, JA; Major Leslie A. Nepper, JA; Captain Paul J. Perrone, Jr., JA (on briefs); Captain Patricia A. Lewis, JA. For Appellee: Colonel Russell S. Estey, JA; Lieutenant Colonel Eugene R. Milhizer, JA; Captain Mary E. Braisted, JA; Captain Joseph A. Pixley, JA (on brief); Colonel Russell S. Estey, JA; Captain Mary E. Braisted, JA; Captain Joseph A. Pixley, JA (on supplemental brief).

14 July 1999

MEMORANDUM OPINION

ECKER, Judge:

Contrary to his pleas, a General Court-Martial composed of officer and enlisted members convicted appellant of attempted premeditated murder, attempted conspiracy to commit murder, attempted conspiracy to solicit the commission of murder, and two solicitations to commit premeditated murder,[1] in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934 [hereinafter UCMJ]. His approved sentence included a dishonorable discharge, forfeiture of all pay and allowances, confinement for twenty years and reduction to private E1. Appellant was credited with 201 days toward the sentence to confinement.

In his supplemental assignment of error,[2] appellant claims his court-martial lacked jurisdiction to try him, rendering the findings void. The essence of this claim[3] concerns the record's failure to show, as required by Article 25(c)(1), UCMJ, that appellant personally, on the record, chose trial by a panel composed of at least one-third enlisted members. We agree that the record of trial contains no evidence of an "on the record request"

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[1] Appellant was originally charged with two conspiracies: to commit murder and solicitation to commit murder. Due to a failure of proof, the military judge reduced those offenses to attempted conspiracies. The specifications were then placed, along with the specification of attempted premeditated murder, under the original attempt charge, the original conspiracy charge, (Charge II) was dismissed, and Charge III was renumbered. The members acquitted appellant of a third solicitation specification.

[2] Appellant's original assignment of error asserted a claim of multiplicious charging. See Rules for Court-Martial 907(b)(3)(B)(and discussion thereto); see also R.C.M. 307(c)(4) discussion.

[3] The claim is phrased in the following terms:

THE ABSENCE IN THE RECORD *OF ANY* REQUEST FOR TRIAL BY OFFICER AND ENLISTED MEMBERS CONSTITUTES JURISDICTIONAL ERROR AND RENDERS THE COURT-MARTIAL PROCEEDINGS IN THIS CASE VOID.

by appellant. We have also considered appellant's unchallenged sworn post-trial affidavit on this matter. This review satisfies us that none of the principles announced in *United States v. Ginn*, 47 M.J. 236, 248 (1997), directly apply such that we could fairly resolve the issue of forum selection on the whole record now before us without a post-trial hearing. "[T]he record of trial, the pleadings, and the affidavit do not demonstrate conclusively that appellant [is or]is not entitled to relief." *See United States v. Hanley*, No. 97-0363/AF (C.A.A.F. February 24, 1999)(citing *Ginn*, 47 M.J. 236). Therefore, as our superior court did in Hanley, "we believe that further inquiry concerning this allegation must be undertaken before we can continue our review of this case." *See id.*

Appellant was a highly regarded combat veteran serving in the Ranger Regiment. While some witnesses characterized him as slow, his military records listed his general technical (GT) score as 118, or well above average. Further, in slightly more than ten years of active duty service, appellant had attained the rank of Sergeant First Class.

At appellant's arraignment, the military judge fully and correctly advised him of his three forum options. This advice indicated that he had the right to be tried by a panel of at least five officer members; but, if he requested if, the panel would include at least one-third enlisted members. He was also told that he could request trial before the military judge sitting alone. Appellant stated, in response to the judge's questioning, that he understood his rights concerning forum selection, the three options available to him, and that the election of forum was his choice. However, the actual election, and its announcement on the record,

was deferred on request of appellant's defense counsel.[4]

At the last 39(a) session,[5] held on 17 March, before the trial on the merits started,[6] the following colloquy occurred:

> MJ: I just want to clarify two matters on the record before we formally start at this point. Did the accused formally elect an enlisted panel on the record, Captain Rose? I don't recall that he did.
>
> DC: We indicated that on the record, your honor.

---

4 MJ: Do you understand the differences between trial before members and trial before judge alone?

ACC: Yes, your honor.

MJ: And do you understand *the choices that you have?*

ACC: Yes, your honor.

MJ: By which type of court *do you wish* to be tried?

DC: Your honor, at this time we'll defer election of forum.

MJ: Okay. I'll allow you to do that.

The accused will now be arraigned.
(R. at 6-7)(emphasis supplied.)

5 UCMJ art. 39(a).

6 Subsequent to arraignment, four additional pretrial sessions under Article 38(a), UCMJ, were convened to address motions and preliminary matters. During the third session, held on 5 March, defense counsel sought to resolve a request for witnesses and identify who would be detailed to the court-martial panel so that he could prepare for the voir dire of the panel. After some discussion, the military judge urged trial counsel to expedite the selection of the members and give that information to the defense. The apparent result of this urging was the issuance of Court-Martial Convening Order Number 2, dated II March 1997, which detailed enlisted members to the court-martial panel for the first time in appellant's case. At the next (fourth) Article 39(a) session, held on 13 March, defense counsel discussed with the military judge how his planned voir dire of potential members might bear on the length of the proceedings. Appellant was present at both of these sessions but had no questions or input concerning the matters noted above or his forum rights.

MJ: Okay. I know that that was his desire, but I don't know that we actually covered that on the record.

DC: We did not, your honor.

MJ: Okay —

DC: I believe that we deferred selection of forum in the previous 39(a).

MJ: Okay, and his desire, I take it from looking at the fact that there are enlisted folks sitting — names at least over here on the panel, is that he be tried before an enlisted panel. Is that correct?

DC: Yes, your honor, it is.

MJ: Okay, and the final matter was plea. At one point I allowed the accused to defer. Would the accused formally enter a plea to the charges and specifications?

DC: To all charges and specifications the accused pleads: Not Guilty.

MJ: Okay. Is there anything additional before we call the members in? I believe those are the only matters that we still had that absolutely, positively had to be taken care of before we started the trial.

TC: No, sir, there's nothing additional.

MJ: Okay. This 39(a) Session is terminated. If you would call the members. . .

No other discussion concerning appellant's forum election appears in the record of trial. However, during voir dire, the record indicates that the defense questioned three members individually and that appellant consulted with counsel during the questioning of an officer and an enlisted member. Finally, during the

announcement of challenges, counsel again consulted appellant before challenging an officer member for cause and an enlisted member peremptorily. Both challenges were granted.

In his sworn post-trial affidavit, appellant now recalls being advised concerning the three forum types by both the military judge and detailed defense counsel, but asserts he was never "informed [] how forum selection would be effectuated." He goes on to state that he never discussed a choice of forum with anyone, and after Court-Martial Convening Order Number 2 was provided to the defense, "It was my belief that when General Ernst issued the order, *dictating members that would try me*, the issue was closed," and "I could not, *nor can I*, comprehend how any action on my part could invalidate a General's orders." Appellant's Exhibit XXXIII-O (emphasis supplied). He concludes by stating, "I never requested to be tried by enlisted members" but instead followed the General's order.

Article 25(c)(1), UCMJ, states that enlisted personnel may serve as members of a court-martial panel hearing the case of an enlisted soldier "only if . . . the accused personally has requested orally on the record or in writing that enlisted members serve on it." Further, the article requires that this election be made during a *pretrial* Article 39(a), UCMJ, session or, in the absence of such a proceeding, *before assembly* of the court. Violation of the article's requirements was held to be jurisdictional, requiring the setting aside of any convictions by an enlisted panel not personally selected on the record by an accused. *See United States v. White*, 21 U.S.C.M.A. 583, 45 C.M.R. 357 (1972); *United States v. Brandt*, 20 M.J. 74 (C.M.A. 1985). *But cf. United States v. Mayfield*, 45 M.J. 176 (1996).

Until recently, this court has applied *White* and required strict compliance with the terms of Article 25, UCMJ. *See United States v. Brookings*, 33 M.J. 793 (A.C.M.R. 1991); *United States v. Hood*, 37 M.J. 784 (A.C.M.R. 1993). However, the recent decision of the Court of Appeals for the Armed Forces in *United States v. Turner*, 47 M.J. 348 (1997), casts substantial doubt on the continued vitality of White and its progeny. *Turner*, involved related, and what was previously considered jurisdictional significant, requirements for selecting trial by judge alone under Article 16, UCMJ. The court applied the concept of substantial compliance and sustained an otherwise defective forum selection. Based on *Turner*, this court recently applied the concept of substantial compliance to resolve a technical violation of Article 25, UCMJ. *See United States v. Lanier* — M.J. — (Army Ct. Crim. App. 2 Apr. 1999). *But cf. United States v. Townes*, — M.J. — (N.M. Ct. Crim. App. 28 Apr. 1999).

We note that in finding substantial compliance in the *Turner* case, the court stated, "The record of trial as a whole makes clear that the selection was the accused's choice, and that the error . . . did not materially prejudice the substantial rights of the accused. Art. 59(a)." 47 M.J. at 350. In reaching this conclusion concerning the record "as a whole," the court looked to the prevailing federal treatment of Fed. R. Crim. P. 23 (a), (b) which is "the civilian counterpart of Article 16." This review indicated that, "[w]here the record reflects that the defendant understands his rights" and either "desires" or "consent[s]" to the forum involved, failure to strictly comply with the requirements of the Federal Rules "is regarded as a nonjurisdictional procedural error." *Turner*, 47 M.J. at 350 *(citing United States v. Fisher*, 912 F.2d 728 (4th Cir. 1990)).

While appellant's affidavit addresses pertinent questions bearing on the presence of enlisted members, its silence in other areas is almost deafening. Further, portions appear to conflict with statements by appellant found in the transcript as well as representations of his trial defense counsel. This latter point may also implicate a question of ineffective assistance of counsel. In any event, the record of trial and appellant's affidavit, taken together, place in doubt whether he understood his forum rights and more importantly, whether the forum utilized was due to his choice or one he consented to.

Accordingly, the current record needs further development before we can fully and fairly evaluate the credibility of appellant's affidavit or resolve the issues noted above, and thereby determine whether Article 25, UCMJ, was "substantially complied" with, and if not, whether any prejudice has occurred due to the error. This court has used the *Dubay*[7] proceeding to attempt resolution of such questions. *See, e.g., United States v. Daniels*, ARMY 9700601 (Army Ct. Crim. App. 23 Sept. 1998) (unpub.); *cf. Hanley*, No. 97-0963/AF. Under the circumstances of this case, we elect to use that mechanism for additional fact-finding.

The record of trial shall be returned to The Judge Advocate General for remand to a convening authority. That convening authority will refer the record to a general court-martial for a hearing pursuant to Dubay, 37 C.M.R. at 413. The military judge will determine whether appellant made and communicated a forum selection, and if so, how he communicated such selection. The military judge will hear the respective contentions

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[7] *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

of the parties on the questions, permit the presentation of witnesses and evidence in support thereof, make rulings as appropriate and within fourteen days of the hearing, enter findings of fact and conclusions of law thereon. At the conclusion of the proceedings, the record, with an authenticated verbatim transcript of the hearing, shall be returned to this court for further review.

Senior Judge Squires and Judge Merck concur.

FOR THE COURT:
JOSEPH A. NEURATER
Clerk of Court

APPENDIX B

IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	AFFIDAVIT
	)	
APPELLEE,	)	CRIM. APP. DKT.
	)	NO. 9700480
V.	)	
	)	
LOWELL L. MCGEE SFC,	)	
UNITED STATES ARMY	)	
	)	
APPELLANT.	)	
	)	

I, Lowell L. McGee, do swear that the following statements are true and correct to the best of my knowledge:

1. During one of the initial meetings between Captain Rose, my detailed defense counsel, and I, Captain Rose informed me that there were three types of General Court-martial forums: Judge alone; officer panel, and; officer and enlisted panel.

2. During the above stated conversation, Captain Rose told me that we did not have to worry about that (forum) at the time because there would be delays and there were other important things to take care of.

3. During the initial session with the military judge, he informed me of the three types of forum.

4. The next discussion we had regarding forum was when Captain Rose showed me the order by General Ernst that had my name on it and listed the members

that would try me.

5. During the discussion mentioned in para. 4 above, Captain Rose asked me if I knew any of the members on the list or thought that they may know me. I told him that I knew Captain Townsend. He told me something to the effect that that did not matter because General Ernst had excused him.

6. I vaguely recall the conversation between the military judge and Captain Rose on the day of the trial. I did not believe it was important at the time because General Ernst had already issued the order as to who would try me.

7. I was informed of the various types of forum for a General Court-martial by Captain Rose and the military judge.

8. Neither Captain Rose nor the military judge informed me how forum selection would be effectuated.

9. It was by (sic) belief that when General Ernst issued the order, dictating members that would try me, the issue was closed.

10. I never questioned General Ernst's authority to issue the order.

11. I could not, nor can I, comprehend how any actions on my part could invalidate a General's orders.

12. I never requested to be tried by enlisted members.

13. General Ernst issued an order that some of the panel members would be enlisted and that order was followed.

/signed/
Lowell L. McGee
PO Box 76799-4W

310 McPherson Ave.
Ft. Leavenworth, KS 66027-1363

STATE OF KANSAS
COUNTY OF LEAVENWORTH

Sworn to and subscribed before me this 24th of May 1999.

(SEAL)

/signed/
NOTARY
MY COMMISSION EXPIRES
29 MAY 2000

APPENDIX C

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before

TOOMEY, TRANT, and CARTER

Appellate Military Judges

UNITED STATES, Appellee

v.

Private E1 ANTHONY L. NEHRING

United States Army, Appellant

ARMY 9700342

ORDER

WHEREAS, the appellant filed a Brief on Behalf of Appellant on 7 April 1998;

WHEREAS, appellee filed a Brief on Behalf of Appellee on 4 February 1999;

WHEREAS, oral argument was heard before this Court on 24 March 1999;

WHEREAS, appellant has alleged in appellate brief and during oral argument that the record of trial does not indicate that he stated on the record his intent to be tried by a court-martial panel consisting of at least one-third enlisted members;

WHEREAS, the record of trial indicates that only appellant's trial defense counsel stated on the record

that appellant requested a panel including enlisted members;

WHEREAS, appellant asserts that because he did not personally request, on the record, a panel that included enlisted members, in accordance with Article 25, UCMJ, and cases decided thereunder, his court-martial lacked jurisdiction to try him; and

WHEREAS, this Court is unable to resolve these issues, in this case, without an evidentiary hearing; it is by this Court, this date

ORDERED

1. That the record of trial is returned to The Judge Advocate General for transmittal to an appropriate convening authority who shall order an evidentiary hearing before a military judge pursuant to *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).
2. That the hearing be conducted within sixty days from the date of this order;
3. That, at the hearing, the military judge will receive all available evidence in order to make specific findings of fact concerning the allegations noted above.
4. That the military judge permit the presentation of witnesses and evidence, make rulings as appropriate, and enter findings of fact and conclusions of law with respect to the following questions:
    a. Whether appellant's counsel advised appellant of his forum selection choices prior to or during the court-martial;
    b. Whether appellant made a personal deci-

sion regarding forum choice, and the nature of that decision;

c. Whether appellant conveyed such decision to his military defense counsel and/or the military judge;

d. Whether appellant's counsel correctly advised the military judge of appellant's personal decision concerning forum selection.

5. That at the conclusion of the proceedings, the record, with an authenticated verbatim transcript of the hearing, be returned to this Court for further review.

DATE: 26 March 1999

FOR THE COURT:
JOSEPH A. NEURATER
Clerk of Court